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THE HISTORY OF THE LAW OF NATURE: A PRELIMINARY STUDY.

SECOND ARTICLE.

Grotius.—We have seen in the former part of this study[1] that in the course of the seventeenth century the classical tradition of the Law of Nature was broken up after the Reformation controversies, with the result that in this country it has been forgotten or misunderstood ever since. Oblivion went so far that it was possible for Bentham and his followers to suppose quite honestly that the Law of Nature meant nothing but individual fancy. But at the same time that the Law of Nature ceased to be honoured among us in speculation, it was entering on new spheres of practical power. The modern law of nations was founded by Grotius on a revised scheme of natural law, and his foundations have always and everywhere been treated as sound except by one insular and unhistorical school. Grotius's doctrine was expanded and made the common property of public men by his successors; it was accepted in this current form by the English publicists of the eighteenth century, and thus had considerable influence on English and still more on Scottish expositions not only of the

[1] 1 COLUMBIA LAW REVIEW, 11.

law of nations but of public law in general. In the domain of private law the ideas of reasonableness and natural justice, which do not the less belong to the Law of Nature because they have been called by different names at different times, leapt into fresh activity, and created or largely modified whole bodies of doctrine. Later, by a process which at first sight looks paradoxical, the same ideas became the vehicle for spreading the distinctive principles and methods of the Common Law in lands where it did not and could not formally claim any jurisdiction. We shall now try to follow the Law of Nature in these several careers of conquest, of which some at least are far from being closed.

International Law.—With regard to International Law, it is notorious that all authorities down to the end of the eighteenth century, and almost all outside England to this day, have treated it as a body of doctrine derived from and justified by the Law of Nature. There has been a certain divergence of opinions on the question whether the law is established by the reason of the thing alone—*natura rationalis*, as Grotius says—or by the actual usage of civilized nations. But this divergence is really more in expression than in any fundamental conception. It was never asserted by the most zealous advocate of the Law of Nature that an individual opinion of what is just can, as such, make a general rule. Here, as elsewhere, we must apply the principle of Aristotle, and deem that to be reasonable which appears so to competent persons. There must be a competent and prevalent consent, and the best evidence of such consent is constant and deliberate usage. Discordant opinions as to what is right or convenient could never produce a uniform accepted usage, as, on the other hand, no other reason can be assigned for the general acceptance of certain usages by independent States than that they are generally believed to be convenient and just. In fact, the elements of reason and custom have been recognized by the highest authorities as inseparable, and strengthening one another. Thus the English law officers (among whom Lord Mansfield, then Solicitor-General, took the leading part) wrote in their celebrated opinion in the case of the Silesian Loan that the law of nations is "founded upon

justice, equity, convenience, and the reason of the thing, and confirmed by long usage."[1] In the very infancy of the doctrine Alberico Gentili, while he declared that the *ius gentium* applicable to the problems of war was identical with the Law of Nature, and claimed for it the authority of absolute reason, also vouched the continuing and general consent of mankind to witness it; not an imaginary consent of all men living at any one time, but an agreement constant and prevalent—in fact, *quod successive placere omnibus visum est.* For all practical purposes we may define International Law, with the late Lord Russell of Killowen, as "the sum of the rules or usages which civilized States have agreed shall be binding upon them in their dealings with one another," remembering, however, that the agreement need not be formal or express. Such rules may, of course, be modified, generally or partially, by convention or usage,[2] in any manner consistent with the objects for which the law of nations exists.[3] This is not only required by convenience, but wholly in accordance with the doctrine of the Law of Nature as received in the Middle Ages, which expressly admitted the validity of positive rules and conventions not contrary to fundamental principle. If any one ever did want to lay down a dogmatic and immutable code of *Naturrecht*, it was not the schoolmen, but the utilitarians.

Some English writers, and even one or two eminent judges, have rather superfluously protested that the opinions of text-writers cannot make law for nations.[4] It is certain, as Lord Stowell pointed out, that they cannot; but the consensus of authors of good repute, or even the clear statement of one eminent author, may be taken as

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[1] This opinion is commonly referred to in the French version given in Martens' collection. The English may be seen in Holliday's Life of William Earl of Mansfield, London, 1797, pp. 428 *et seq.*

[2] See *per* Lord Stowell, The Santa Cruz, 1 Rob. Adm. at p. 58; The Flad Oyen, *ibid.* at p. 139; The Henrick and Maria, 4 Rob. at p. 54.

[3] All moralists allow that in some cases it is better, or less bad, to break an agreement that ought never to have been made than to perform it. The exception must apply to nations as well as individuals, though *pactum serva* is the rule, and it is not good to dwell on exceptions. A treaty for the partition of an unoffending neighboring State, for example, is only a conspiracy aggravating the crime.

[4] See Cockburn, C. J.'s observations in R. *v.* Keyn, 2 Ex. Div. at pp. 202–3, which seem to overlook the true doctrine laid down long before by Lord Stowell.

evidence of the accepted practice where practice is not shown to be otherwise. "Vattel" said Lord Stowell in a leading case on the right of visit and search "is here to be considered, not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact that such is the existing practice of modern Europe."[1] It is equally plain that no State can maintain claims to exercise a novel jurisdiction over citizens of other States by appealing to the Law of Nature in the sense of the opinion entertained by itself alone of what is right and convenient in the case. An argument really of this kind was urged with great ability and eloquence, but without success, by the counsel for the United States in the Bering Sea arbitration. All this, again, is in strict agreement with the general principles of natural law. No particular opinion of this or that learned person, much less of an interested party, can make that reasonable which is not acceptable as such to the general opinion of civilized mankind.

In this country questions of International Law have mostly arisen in Admiralty jurisdiction, and our classical authorities consist to a great extent of Lord Stowell's judgments on points arising out of the exercise of belligerent rights at sea in the war against the French Republic and Empire. There is no doubt whatever as to the kind of law that Lord Stowell thought he was administering. It was *ius gentium* in the fullest sense, a body of rules not merely municipal, but cosmopolitan. For him the Court of Admiralty was a court of the law of nations, and of the law of nations only, not intended to carry into effect the municipal laws of this or any other country. "The seat of judicial authority is locally here, in the belligerent country, according to the known law and practice of nations, but the law itself has no locality."[2] As for the opinion that nations are bound by the law of treaty only, and there is no other law of nations but that which is derived from positive compact and convention, Lord Stowell rejected it as fit only for Barbary pirates.[3] We must either admit

[1] The Maria, 1 Rob. at p. 363. To the same effect, quite lately, the Supreme Court of the U. S. per Gray, J., The Paquete Habana, The Lola (1899) 175 U. S. 677, 700.

[2] The Maria, 1 Rob. 341, 350; The Two Friends, 2 Rob. 280; The Walsingham Packet, *ibid.* at p. 82. [3] The Helena, 4 Rob. 7.

that modern International Law is a law founded on cosmopolitan principles of reason, a true living offshoot of the Law of Nature, or ignore our own most authoritative expositions of it. In fact, these utterances have been wholly ignored, so far as I know, by English publicists of the extreme insular school.

"*Natural Justice*" *in the Modern Common Law.*—Although the medieval mould of natural law was broken, the substance of its ideas passed into the common stock of European publicists through the new learning of the law of nations, and their influence was manifest in a rationalist movement which had many branches—rationalist because the Law of Nature is essentially so. This last statement would have been a truism in the sixteenth century, and is still familiar on the Continent; it may seem a paradox to some English readers nowadays, but it remains true. Scotland, kept by political traditions in closer touch with Continental thought than England, had an important share in spreading the movement in these kingdoms. It was no accident that our two great rational law reforms of the second half of the eighteenth century were carried out by Lord Mansfield, a Scotsman by birth.

The Law Merchant.—First of these must be mentioned, though this is not the place for a full account, the definite adoption of the law merchant as part of the Common Law. That body of custom had anticipated some of the characters of International Law; it claimed an authority independent of any particular local jurisprudence, as being founded on general reason and usage approved as reasonable; in other words, it was a branch of the Law of Nature, and it was constantly described as such. Under Lord Mansfield it was received, not as a collection of rules to which only legislation could add, but as a coherent system which did not lose its vitality and power of development from within because it was incorporated with the law of the land. Such, at least, is the better modern opinion as to its present standing.[1]

The "Common Counts."—Hardly less important was the introduction in Common Law procedure of a liberal and

[1]See Mr. F. B. Palmer's article in the Law Quarterly Review for July, 1899 (xv. 245).

elastic remedy on causes of action *quasi ex contractu*. Blackstone, following Lord Mansfield's creative example as a faithful expositor, said in so many words of this class of actions—those of which the count for "money had and received to the plaintiff's use" is the type—that they arise "from natural reason and the just construction of the law."[1] Thus the whole modern doctrine of what we now call quasi-contract rests on a bold[2] and timely application, quite conscious and avowed, of principles derived from the Law of Nature.

The Reasonable Man.—One of the most characteristic and important features of the modern Common Law is the manner in which we fix the measure of legal duties and responsibilities, where not otherwise specified, by reference to a reasonable man's caution, foresight, or expectation, ascertained in the first instance by the common sense of juries, and gradually consolidated into judicial rules of law. The notions of a reasonable price and of reasonable time are familiar in our law of sale and mercantile law generally. Within the last century and a quarter, or thereabouts, the whole doctrine of negligence has been built up on the foundation of holding every lawful man answerable for at least the amount of prudence which might be expected of an average reasonable man in the circumstances. Now St. German pointed out as early as the sixteenth century that the words "reason" and "reasonable" denote for the common lawyer the ideas which the civilian or canonist puts under the head of "Law of Nature."[3]

Thus natural law may fairly claim, in principle though not by name, the reasonable man of English and American law and all his works, which are many.

Open Questions of Principle in the Common Law.—Sometimes, though not often, questions have come before our courts of purely municipal jurisdiction which were so much "of first impression" that there was really no applicable authority at all. Upon such questions, topics of argu-

[1] Blackst. Comm. iii. 161. The best known statement by Lord Mansfield himself is in Moses *v.* Macfarlan (1760) 2 Burr. 1005.

[2] "Lord Holt used to say that he was a bold man that first ventured on them [the general or common counts] though they are now every day's experience."—1 Wms. Saund. ed. 1871, 366.

[3] See 1 COLUMBIA LAW REVIEW, at p. 29.

ment were necessarily sought in the most general principles of justice and convenience, and discussed and weighed with very little reference to any more specific test. A medieval lawyer would have said of such questions that, since positive law did not afford any solution of them, they were soluble by the Law of Nature only. The best known example in this kind is the long-continued controversy on the existence of copyright and other analogous rights at Common Law, independent of legislation—a controversy which produced a great body of ingenious argument and more than one notable conflict of judicial opinions. We have no occasion to say anything here of the merits or of the result, which dialectically was a drawn battle,[1] but only to note that the arguments and opinions on both sides were *Naturrecht* pure and simple.

Natural Justice in Quasi-Judicial Acts.—The principles of natural justice are recognised and applied by name in the class of cases where our courts have had to review the exercise of quasi-judicial powers by the boards, committees, or other governing bodies, however described, of divers institutions and societies. There is a preliminary question whether the power which the governing body has purported to exercise against an individual was "judicial" or "absolute." An absolute discretion for which no reasons need be given may be conferred either by statute or by the agreement of the persons concerned (for example, by the terms on which an appointment had been offered and accepted), and such a discretion, where it has been conferred, cannot be impeached on any ground short of fraud. In other cases the court will consider whether the rules of natural or universal justice have been observed; the expressions are synonymous and equally current. Those rules are, for this purpose, that when a person is deprived on the ground of alleged misconduct of an office or honourable rank, or of an interest in property administered[2] by an

[1] The last judicial discussion was in 1854—Jefferys *v.* Boosey, 4 H. L. C. 815. There the judges were divided, and the House of Lords unanimous for the negative opinion. But the actual final decision was not that copyright did or did not exist at Common Law, but that, if it ever did, it had been abolished by the Statute of Anne which conferred copyright for a term of years.

[2] The legal title to such property is of secondary importance. It may be corporate, or vested in trustees, or held in common by all the members.

association for the benefit of its members, he must have notice of the charge against him and an opportunity of being heard, and the special rules, if any, governing proceedings of that kind in the institution or society in question must be exactly followed, and the decision must be arrived at in good faith, with a view to the common welfare. If these conditions are satisfied, the court will not examine the merits of the decision as if it were sitting on an appeal. The jurisdiction is not of an appellate, but of a prohibitory nature; it is paramount to the jurisdiction of the "domestic tribunal," which, on the other hand, is not interfered with so long as it does not offend against the paramount rules of universal justice.

Even in the case of a summary executive authority founded on necessity (which may be said to be itself a matter of natural right), the rules of natural justice must be observed so far as practicable. The master of a ship has such an authority, and this is perhaps the only known case.[1]

Disregard of Natural Justice by a Foreign Court.—It would be a strong extension of these principles to apply them to the judicial acts of a competent foreign tribunal within its jurisdiction, and it is not known to have been actually done in England. Still, there is some authority for saying that, in an extreme case, a foreign judgment showing manifest disregard of universal rules of justice would itself be disregarded here. In cases where this topic has been suggested, other more definite grounds of objection have been present, such as want of jurisdiction. But judges of great eminence have claimed for our courts a reserved power of taking the broader ground at need. It is certain, on the other hand, that our courts do not pretend to review the manner in which a foreign court administers its own rules of procedure, nor to require that foreign procedure should conform to any of our merely local standards.[2] The exclusion of witnesses on the ground of interest, for example, is a system which we have discarded, but we cannot complain of its maintenance in other jurisdictions,

[1] The Agincourt, 1 Hag. Adm. 271, 33 R. R. 717.

[2] See on this delicate subject Westlake, Private International Law, 3rd. ed. 351; Dicey, Conflict of Laws, 409; Simpson *v.* Fogo, 1 H. M. 195, the reported case where the strongest remarks occur; Pemberton *v.* Hughes [1899] 1 Ch. 781, 790.

nor, contrariwise, of the admission in evidence of hearsay and other matters which we should exclude. In this region of specific regulation the part of natural law is, as the medieval doctors said, only secondary, and is confined to giving to authentic acts and instruments, in case of doubt, that interpretation and effect which may appear most fitted to work substantial justice.

Conflict of Laws in General.—As to the body of doctrine known under the head of "Conflict of Laws" or "Private International Law," its authority was originally founded on considerations of natural justice, for so much at least is implied in the fact that, though it is not *ius inter gentes*, it has always been deemed to belong to the law of nations in the wider and more ancient sense of *ius gentium*. But it has now for many years been as much part of the municipal law of England as the law merchant, and it becomes daily less and less needful or useful, in any normal case, to cite foreign authorities [1] or resort to general principles of convenience. The ideal is still cosmopolitan; the actual law of the courts is national; and I believe this is so, or tending to be so, in other countries also.

The Common Law beyond Seas.—Students of comparative jurisprudence need not be reminded that there are extensive territories under British dominion in which English law has never been received as a whole, or introduced by any sovereign act except in particular local jurisdictions and for limited purposes.[2] The most remarkable example is afforded by British India. Here we find that the Law of Nature has played a singular and almost paradoxical part. It has been the means of effecting a large importation of English ideas and principles in regions where any formal Common Law jurisdiction was not only not asserted, but formally disclaimed.

[1] This is not subject to any exception as to the ascertainment of foreign law in the particular case; for that, in our system, is matter not of authority but of evidence, though parties may, and often do, agree to put in the text of a foreign code, or appropriate parts of it, instead of calling foreign experts to prove their law.

[2] In one Crown colony, Trinidad, there has never been any wholesale reception of English law, but a series of enactments has anglicised one branch after another till there is practically nothing else left in either substantive law or procedure. There may be other examples unknown to me, but such cases are of little general importance, and they do not belong to the present inquiry.

"*Justice, Equity, and Good Conscience*" *in India.*—In the early days of our Indian settlements European traders, like all persons in Eastern countries, were presumed to carry their personal law with them. The charter of 1683, principally intended for Bombay, seems to have contemplated a court administering to such traders, not the Common Law, but the law merchant. If this experiment proceeded at all, as I think it did not, it left no permanent mark. In the following century the Supreme (now High) Courts of the Presidency towns were established by the authority of Parliament to administer English law to European British subjects within limited territorial jurisdictions.[1] Otherwise, neither the King's Courts nor the East India Company's Courts were authorized or, in fact, assumed (after a transitory stage of disastrous experiment) to administer English law as such. They were directed to do justice according to the native laws of the parties, if applicable rules could be found. But it often happened that no such rules could be found, and some general provision had to be made. A Bengal Regulation of 1793, substantially copied at various intervals of time in the other Presidencies and provinces, laid down that in such cases the judges were "to act according to justice, equity, and good conscience." These words, down to the end of the eighteenth century, could only be read by any publicist or trained lawyer as synonymous with the Law of Nature. But no detailed system of the Law of Nature has ever acquired general authority. We may safely assume that the attempts of European publicists to construct such systems were unfamiliar to the vast majority of the company's officers; we know that English utilitarianism, which its votaries would have been only too eager to turn loose on the *mufassal*,[2] was only just born. English officials in India being what they were, "an Englishman would naturally interpret these words [justice, equity, and good conscience] as meaning such rules and principles of English law as he happened to know and

[1] For authorities and details see Sir Courtenay Ilbert's Government of India, and, for the earlier history of the Supreme Court of Calcutta, Cowell's Courts and Legislative Authorities in India, lects. ii. and iii.

[2] The correct spelling, *mufassal*, has been officially adopted for some time. The common Anglo-Indian form *mofussil* is a solecism,

considered applicable to the case; and thus, under the influence of English judges, native law and usage were, without express legislation, largely supplemented, modified, and superseded by English law."[1] In our own time this has been judicially approved as the proper course. Equity and good conscience, we are told by the Judicial Committee of the Privy Council, are generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances.[2] The moral predominance thus acquired by the Common Law in British India may be compared with that which was acquired by the Roman law, not as positive law, but as "written reason," in the *pays de droit coutumier* of the French monarchy.

The Island of Penang under the Law of Nature.—There is a singular case of a British possession in the East having been abandoned (it will be seen that no other term is possible) to the Law of Nature for several years.[3] In 1786 a native Raja purported to cede Penang, then uncultivated and unsettled, to an officer of the East India Company. Possession was taken. under orders from the Governor-General and Council of Bengal, "in the name of his Majesty George the Third and for the use of the Hon'ble English India Company." The intention was apparently to put Penang under the Bengal Regulations, or at any rate the power to make Regulations. But difficulties were raised as to the Governor-General's jurisdiction, and the result was that for twenty years (except for a few provisional directions issued by the Governor-General on emergency)[4] there was no positive law in Penang. At any rate, nobody knew whether there was any, or if any, what; and in 1803 the judicial officer of the island reported that the Law of Nature was the only law he could find to guide him. He also found its guidance inadequate for determining questions of succession and administering

[1] Ilbert, *op. cit.* 394. [2] L. R. 14 Ind. App. at p. 96.

[3] Walter J. Napier, An Introduction to the Study of the Law Administered in the Colony of the Straits Settlements, Singapore, 1898; a very interesting pamphlet, from which the facts in the text are derived.

[4] The local Government purported to make Regulations, but clearly had no authority to do so; Napier, p. 6.

estates,[1] which, indeed, was exactly what any medieval doctor (not to say Aristotle) would have told him to expect. At last, in 1807, the Crown came to the rescue, and a regular court was established by charter.

It would seem, in the light of later authorities and discussion, that the learned magistrate might properly have followed the example of the Company's Court in the *mufassal*, and administered under the name of justice, equity, and good conscience, as much English law as he thought reasonably applicable to the local circumstances. However that may be, the effect of the charter and subsequent legislation and usage was to introduce English law as the territorial law of Penang, and ultimately of what are now called the Straits Settlements as a whole. But the part of the Law of Nature was not yet played out.

The population of the new settlements included a large number of Malays, Hindus, Chinese, and possibly other Orientals, all of whom continued to observe their native customs in matters of religion and the family. No provision for administering their native personal laws to native suitors was ever made by any charter or other legislative act. The Straits Settlements were, indeed, under the Government of India for more than a generation (1830–1866); but nothing took place during that time which could operate as a "reception" of the Bengal Regulations or any of the Anglo-Indian legislation confirming them. Nevertheless, the need for recognising native custom in matters of

[1] "His Excellency in Council has been heretofore informed that Prince of Wales' Island, prior to its cession in 1785 [should be 1786] was under the dominion of a chief who governed arbitrarily and not by fixed laws. It is now become my painful duty to state that it has so continued to be governed without fixed laws; for upon the hour of my arrival on this island, there were not any Civil or Criminal laws then in existence, and there are not even now any Municipal, Criminal or Civil laws in force on this island. The law of nature is the only law declaring crimes and respecting property which, to my knowledge, at this day, exists at Prince of Wales' Island; and as Judge, it is the only law which I can apply to the Criminal and Civil suits brought in judgment before me. But as the law of nature gives me no precepts respecting the right of disposing of property by wills and testaments, the rights of succession and inheritance, and the forms and precautions necessary to be observed in granting Probates of Wills and Lettersof Administration to intestates' effects, or respecting many things which are the subject of positive law, I have often been much embarrassed in the execution of my duty as Judge in the Court of Justice in which I preside; and many cases there are in which I am utterly unable to exercise jurisdiction."—Mr. Dickens' report to the Governor-General, ap. Napier, at p. 5.

family law was practically the same as in India; and, after a good deal of discussion, it appears to have been now settled for many years that in a general way "native customs . . . will be recognised unless they be contrary to justice and general public policy."[1] Now the general rule of our authorities is that only so much of existing English law becomes the law of a new English settlement as is reasonably applicable to local circumstances. This may be said already to involve a reference to the Law of Nature, for the appeal to the test of reasonableness is, as we have seen, really the same thing. At any rate, there is no express grant of jurisdiction to administer any other positive law than our own. Again, it will hardly be maintained that Hindu or Mahometan law can ever be binding on English judges, in the cause before them, by its own intrinsic authority. There seems, therefore, to be no other assignable source of the jurisdiction which is in fact exercised than the Law of Nature; in other words the judicial conviction of the court that in a particular class of cases not only is it not reasonable to apply English law, but it is reasonable to apply the native custom of the parties. It remains open to speculative discussion whether we ought to say that in such cases the court is free to decide according to the Law of Nature because there is nothing in the positive law generally binding on the court to exclude or supersede it, or that the court is bound to follow the Law of Nature because, in the local circumstances and in that class of cases, the Law of Nature is embodied in the Common Law. That the law actually administered is not the native personal law itself is sufficiently shown by the care with which the claims of "justice and general public policy" are reserved as paramount. Thus a considerable part of the inhabitants of the Straits Settlements live to this day, and apparently thrive, as to a considerable proportion of their affairs, under a judicial discretion founded on natural equity alone, and, though no doubt becoming fixed in the way of precedent, never defined by any external authority.

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[1] Extract from a judgment of the local Court of Appeal, ap. Napier, p. 39.